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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JULIA SAAVEDRA BALMACEDA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Government's Brief in Opposition does not contradict, but confirms, that certiorari should be granted in these cases. The Government admits both that under Fed. R. Civ. P. 12(b), on the Government's motion to dismiss, the factual allegations of Petitioners' complaints must be accepted as true and that, when so accepted, the complaints plead a cause of action for negligence under Pennsylvania law. The Government argues that yet a third standard for testing the sufficiency of the complaints should be applied, and warrants their dismissal. This third standard purportedly derives from the text of the Federal Tort Claims Act (the "Tort Claims Act" or "Act"), specifically 28 U.S.C. § 2680(a), which exempts from

the waiver of sovereign immunity "[a]ny claim based upon" the exercise or performance of a discretionary function. Opposition Brief at 6-7.

According to the Government, the complaints were properly dismissed because they involve claims "based upon" discretionary conduct of the FDA Commissioner, and not upon the non-discretionary laboratory testing alleged in the complaints as the cause of harm. In positing this standard, the Government cites for comparison only two cases, neither of which is apposite. Moreover, the standard is inconsistent with this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). Furthermore, the Government fails to articulate the substantive content of the proposed standard or to show why its application would require dismissal of the complaints in these cases. If the Government is correct that a new legal sufficiency standard should apply to Tort Claims Act cases involving the discretionary function exception, then it is fundamentally important that this Court establish that standard and instruct as to its application.

Finally, all the criteria for the issuance of certiorari are satisfied. These cases are of international significance; they involve a principle of law critical to the interpretation of the Tort Claims Act; and, contrary to the Government's assertion, the Courts of Appeals are divided on that principle.

ARGUMENT

1. The complaints in these cases expressly plead that Petitioners' harm was caused by negligent, non-discretionary laboratory testing. The Government concedes that the allegations of the complaints must be accepted as true under Fed. R. Civ. P. 12(b) and that the complaints plead all of the elements of the tort of negligence under Pennsylvania law. The Government argues, nevertheless, that Tort Claims Act complaints involving the discretionary function exception must be tested under a unique legal sufficiency standard derived from the "based upon" language of the discretionary function exception. There is no legal precedent or statutory support for the Government's position.

No case, except for the Third Circuit in banc majority decision below, reads the "based upon" language of 28 U.S.C. § 2680(a) as establishing an additional pleading standard for Tort Claims Act plaintiffs. As a consequence, in support of its argument, the Government can do no more than offer a "*Cf.*" citation to one decision of this Court, *Kosak v. United States,* 465 U.S. 848 (1984), and one decision from the Ninth Circuit, *Bramer v. United States,* 595 F.2d 1141 (9th Cir. 1979). Opposition Brief at 6. Neither of these cases supports the Government's position.[1]

Neither *Kosak* nor *Bramer* support an interpretation of Section 2680(a) that would permit a Court to disregard the legal sufficiency standard of Fed. R. Civ. P. 12(b) or impose additional pleading requirements beyond the elements of state tort law incorporated by express reference in the Tort Claims Act. *Kosak* did not even involve the discretionary function exception, but rather involved the detention of goods exception. 465 U.S. at 852; 28 U.S.C. § 2680(c). The issue in *Kosak* was whether that exception encompassed harm to goods caused during the period of detention in addition to the loss in value to the goods because of the detention. This Court concluded that Section 2680(c) shielded the United States from liability from both types of losses. The Government does not explain how *Kosak,* construing Section 2680(c), supports the dismissal of these cases under Section 2680(a).

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1. In the three and a half year history of this litigation, the Government cited the *Bramer* case for the first time in its Brief in Opposition. The Government cited *Kosak* in a Supplemental Brief for the United States, filed on or about December 9, 1994, about two months after the oral argument before the in banc Third Circuit. In that Supplemental Brief, the Government, *for the first time,* argued that the "based upon" language of Section 2680(a) controlled these cases. The Government did not initially argue that the "based upon" language was dispositive. Rather, it argued that the Petitioners' damages were not caused by the FDA Commissioner's actions under ordinary tort-law principles. However, when it became apparent before the Third Circuit that the Petitioners had properly pleaded laboratory negligence as the cause-in-fact and proximate cause of their harm, the Government shifted arguments. In any event, as discussed herein, the Government's newly crafted argument is without merit.

Similarly, the Government does not explain how *Bramer* supports dismissal of the complaints at issue. In *Bramer,* the issue was whether the United States could be liable, under New Mexico law, to employees of an independent contractor for the performance of inherently dangerous work. 595 F.2d at 1144-45. The Ninth Circuit concluded, based upon a then-recent decision of the New Mexico Supreme Court, that state law did not recognize such a cause of action and, therefore, that no Tort Claims Act case was authorized. Thus, *Bramer* simply does not address the position that the Government now argues.

2. In addition to having no caselaw support, the Government's position is inconsistent with the pleading standard set forth by this Court in *United States v. Gaubert,* 499 U.S. 315 (1991). There, this Court stated: "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." 499 U.S. at 324-25. This is precisely what the Petitioners' complaints do. Petitioners have alleged facts supporting their claim that laboratory negligence, which was not discretionary or grounded in FDA policy, was the cause-in-fact and proximate cause of their harm. If some additional pleading standard applies to complaints under the Act involving the discretionary function exception, as the Government now argues, this Court should address this issue of statutory interpretation fundamental to litigation involving the federal government.[2]

3. The reason the Government can find no legal support for its position is that it attempts to create a legal sufficiency standard out of what is in actuality a disputed issue of fact. The fallacy of the Government's argument is most clearly apparent in the Government's statement that the Court of

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2. The Petitioners contend that there should be no additional "based upon" pleading requirement. However, if the Court were to fashion such a standard, the Petitioners request that, in the event their current complaints do not meet the new test, they be permitted an opportunity to amend their pleadings since they did not previously have the benefit of knowing the additional pleading standard at the time their complaints were filed.

Appeals was not "require[d] ... to accept petitioners' *legal* contention that, on the facts alleged in their complaints, their claims were 'based upon' the FDA's negligent laboratory testing rather than the FDA Commissioner's subsequent decision to take protective measures with regard to Chilean fruit." Opposition Brief at 8-9 n. 2 (emphasis in original). Petitioners, however, do not make, and have never made, any such "*legal* contention." Whether their claims are "based upon" non-discretionary or discretionary conduct is not a question of law but of fact. Petitioners' *factual* contention is that their damages were caused by—their claims for damages are based upon—negligent, non-discretionary laboratory testing. To be sure, the Government contends that Petitioners' damages were caused by a discretionary decision by the FDA Commissioner. But that is not a "*legal* contention;" it is a factual contention, and one with no support in the record.

The Government states that the FDA Commissioner's decision to embargo the fruit and order its destruction was taken "in light of [the Philadelphia laboratory] testing (and the other information before him)," and that it was this "discretionary action ... that caused the harm." Opposition Brief at 9. What "other information?" If indeed there is any "information" that would entitle a trier of fact to find that the Commissioner's decision was taken "in light of" (to use the Government's words), or was "based upon" (to use the statute's words), information "other" than the information alleged by Petitioners, then let the Government file an answer to the complaints and proceed to discovery under the Federal Rules of Civil Procedure so that the "other information" alluded to by the Government in its brief may become apparent of record. To dismiss the complaints now, without requiring the Government to produce the "other information" it says it has, would be a grave injustice.[3]

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3. Petitioners have by their complaints represented to this Court that they are prepared to produce evidence on the basis of which a trier of fact could find that their damages were caused by the negligent, non-discretionary conduct of Government employees—precisely the sort of conduct that the Congress has provided should be the basis of compensation. The Government's reference to the observation by the in banc dissenting

4. Assuming the Government is correct that the "based upon" language of Section 2680(a) creates an additional pleading requirement, it has failed to suggest what the substantive content of this requirement is or should be. Whether a claim is "based upon" discretionary or non-discretionary conduct would seem to present an issue of causation: Did discretionary or non-discretionary conduct cause the harm upon which the claim is based? If the "based upon" standard is a causation standard (and the Government does not suggest anything else that it could be), why is an additional causation standard required beyond the cause-in-fact and proximate cause standards required properly to plead a tort under state tort law? The Tort Claims Act expressly states that state tort law will supply the cause of action available to plaintiffs permitted to sue under its waiver of sovereign immunity. 28 U.S.C. § 1346(b). If the "based upon" standard is something beyond the cause-in-fact and proximate cause standards, what is the substantive content of this standard? None of these significant issues is addressed in the Government's brief.

5. The Government has made scant effort to argue that these cases do not satisfy all of the criteria supporting review by this Court. The issue presented in these cases caused a 7-6 split among the in banc Third Circuit, which the Government cannot dispute. The Government does not deny, or even mention, that these cases involve some 2,400 Chilean claimants, that the conduct at issue demolished the Chilean agricultural sector for an entire growing season, and that significant international trade considerations are implicated in these cases. *See* Brief as *Amici Curiae* of the Delaware River Port Authority and the Port of Philadelphia and Camden, Inc. Similarly, the

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NOTES *(Continued)*

judges that Petitioners "may encounter difficulty" in proving their claim, Opposition Brief at 5, is unworthy. It is not the part of the Government, however obliquely, to suggest that Petitioners' case is so weak it may as well be dismissed now. As the dissenting judges recognized, Petitioners, having stated a valid claim, are entitled to have it heard; whether evidence in support of a valid claim is weak or strong is for the trier of fact, not the Government, to say.

Government seeks to minimize or ignore the importance of these cases to the entire regime of litigation against the Government under the Tort Claims Act by suggesting that their interpretation of Section 2680(a) is supported by existing case-law, when, in fact, the Government's position (and that of the in banc Third Circuit majority) is a marked departure from existing law.

Finally, the Government attempts to argue that the issue presented by the Petition has not generated a split among the Courts of Appeals. Specifically, it argues that *Patterson v. United States,* 881 F.2d 127 (4th Cir. 1989), and *Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993), are consistent not only with each other, but also with the decision of the in banc Third Circuit in these cases. The Government's argument does not bear analysis. That a split exists is demonstrated by the fact that the in banc Third Circuit majority cited *Patterson* as supporting its result, Pet. App. at 16a, while the in banc dissent cited *Appley Brothers,* Pet. App. at 22a n. 1, as supporting its analysis. In *Patterson,* the Fourth Circuit held that the complaint was subject to dismissal because the harm alleged was caused by a discretionary decision that followed a non-discretionary inspection. In *Appley Brothers,* the Eighth Circuit held that the complaint was not subject to dismissal because the harm alleged was caused by the non-discretionary inspection of a grain warehouse, notwithstanding the subsequent discretionary decision to allow the warehouse to remain open. To say, as the Government does, Opposition Brief at 12, that the harm in *Appley Brothers* was not "based upon" a discretionary decision not only contradicts the very position the Government argued in that case, 7 F.3d at 726, it also misses the point that a split exists in the circuits. The Fourth and Eighth Circuits reached opposite conclusions regarding what conduct the complaints were "based upon" in the respective cases before them.[4] In addition to the other factors described above, this Court should grant the petition for certiorari to resolve the split among the courts of appeals.

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4. In fact, the Government sought reconsideration of the panel decision in *Appley Brothers* and argued that the panel decision was "contrary to Supreme Court precedent and decisions of other courts of appeals." *See* Appellee's Petition for Rehearing at 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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